United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1312

B
P/S

To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

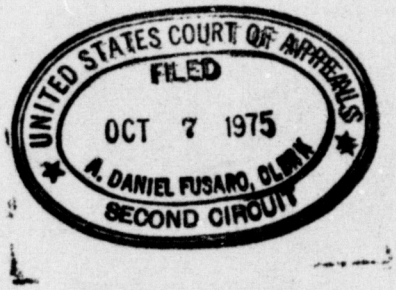
Docket No. 75-1312

VINCENT INGENITO,

Appellant.

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

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OF THE UNITED STATES DISTRICT COURT
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QUESTIONS PRESENTED

1. Whether the failure of the District Court to instruct the jurors that they were required to acquit appellant if they found that DuBois supplied appellant with guns requires reversal of the judgment.

2. Whether the indictment charging appellant with dealing in firearms must be dismissed because the Special Attorney who presented the case to the grand jury exceeded his authority in obtaining the indictment of appellant.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein) rendered on August 22, 1975, after a trial before a jury, convicting appellant Vincent Ingenito of engaging in the business of dealing in firearms without a license (18 U.S.C. §922(a)(1)). Appellant was sentenced to a term of three years' imprisonment. Execution of appellant's sentence was stayed pending appeal.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

On February 3, 1975, an indictment* was filed charging appellant with engaging in the business of dealing in firearms without a license.

On February 19, 1975, defense counsel made a motion to dismiss the indictment, urging that the Strike Force attorney who presented the case to the grand jury, David J. Ritchie,

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*The indictment is "B" to appellant's separate appendix.

exceeded the authority granted him in his letter of commission when he obtained the indictment against appellant charging him with gun control law violations (P.3*).** The District Court denied the motion "pending a ruling from the Court of Appeals" (P.3).

The testimony at appellant's trial was, in part, undisputed. On June 20, 1974, appellant sold a revolver and 49 rounds of ammunition to Agent Aversano, an undercover agent of the Bureau of Alcohol, Tobacco and Firearms (20-21; 98***). Four days later appellant sold another firearm to Aversano (26; 91-92).****

Appellant testified that he obtained the guns he sold to Aversano from Frank Davis, who was also known as Frank DuBois.***** Appellant did not know that DuBois was an

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*Numerals in parentheses preceded by "P" refer to pages of the transcript of the pretrial proceedings.

**Mr. Ritchie's commission of appointment is "D" to appellant's separate appendix.

***Numerals in parentheses refer to pages of the trial transcript.

****Agent Aversano testified that he paid $200 for the revolver sold on June 20 (22), and $164 for the weapon sold on June 24 (26).

*****This individual is hereinafter referred to as "DuBois." Appellant testified that he met DuBois in 1962 or 1963 in Sing Sing Prison, where they both were incarcerated (74). From that time appellant and DuBois remained acquaintances. They conversed in the florist show owned by appellant's father where appellant worked (77). Further, appellant visited DuBois when DuBois was hospitalized in 1973 (78). In June 1974 appellant and DuBois saw each other almost every day.

informer for the Government (20, 94). Appellant testified that at the time of his arrest he told the arresting officer that he had obtained the guns from DuBois (118).* Appellant also testified that he gave the proceeds of each of the sales of the firearms to DuBois (89). For the first sale, DuBois gave appellant $25 (89), and for the second, $20 (91).

DuBois testified on the Government's behalf. He denied giving appellant the guns to sell to Agent Aversano (136).** Rather, DuBois stated that the guns were supplied by an unnamed individual (164-165). According to DuBois, he saw this unnamed person give the guns to appellant (130).*** DuBois testified that he observed these events at night before going to the Felt Forum with appellant.**** However, when DuBois' eyesight was tested in court, he could

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*The contents of appellant's statements at the time of his arrest were corroborated by 3500 arrest material given to counsel during trial and by Agent Aversano's trial testimony (40).

**DuBois testified that he had been, inter alia, a jewel thief and a fence for 25 years, that he had been involved in narcotics (126) and had been convicted of arson and attempted possession of stolen property (128) and rape (128). Further, DuBois stated that he had been arrested some 40 or 50 times (177) and had cooperated with the Government in a narcotics case (126). As a result, DuBois was receiving $10 per day for expenses and the Government paid his rent (173).

***Appellant denied that this incident occurred (105).

****DuBois did not testify about the distance between him and appellant at that time.

not see a pen held by defense counsel (159) and testified that he would be unable to read because he could not see the the pages of a book and that he was "legally" blind in Ohio (157, 158).

At trial, the theory of the defense was that appellant had been entrapped by DuBois (15, 191).*

In his charge,** Judge Weinstein instructed the jurors that if the evidence showed appellant had been induced to commit the crime, the Government must prove propensity beyond a reasonable doubt (223). Specifically, the Judge stated:

> ... If you should find beyond a reasonable doubt from the evidence in the case that before anything else occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit a crime such as that charged in the indictment, whenever the opportunity was afforded, and that the Government offices [sic] or their agents did no more than offer the opportunity, then you should find that the defendant was not a victim of entrapment.
>
> On the other hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit any offense of the character here charged and did so only because he was induced

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*Appellant also asserted that he was not a dealer in guns (15, 180-186) as that term is defined statutorily. 18 U.S.C. §922(a).

**The complete charge to the jury is "C" to appellant's separate appendix.

> or persuaded by some officer or agent of the Government, then it is your duty to acquit him.
>
> (222-223).*

The jurors deliberated on two different days. On both days they requested that the District Judge repeat his instructions on entrapment. Judge Weinstein re-read the pertinent portion of his charge (237-240; 259-262). He did not instruct the jurors that they were required to acquit appellant if they found that DuBois supplied him with the guns to sell.

On the second day of deliberations, the jurors found appellant guilty (262).

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*The complete instructions as to entrapment appear at 221-224 of the trial transcript.

ARGUMENT

Point I

THE FAILURE OF THE DISTRICT COURT TO INSTRUCT THE JURORS THAT THEY WERE REQUIRED TO ACQUIT APPELLANT IF THEY FOUND THAT DuBOIS SUPPLIED APPELLANT WITH GUNS REQUIRES REVERSAL OF THE JUDGMENT.

Appellant testified that the Government's informer, DuBois, supplied him with the guns he had sold to Agent Aversano. Despite this testimony, the District Court failed to instruct the jurors that they were required to acquit appellant if they found these facts to be true. The failure to so charge constitutes reversible error. United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971), cert. denied, 411 U.S. 949 (1973); United States v. Mosely, 496 F.2d 1012, 1016, petition for rehearing en banc denied, 505 F.2d 1251 (5th Cir. 1974); United States v. Oquendo, 490 F.2d 161, 162 (5th Cir. 1974); United States v. Gomez-Rojas, 407 F.2d 1213, 1218 (5th Cir. 1975); United States v. Minichiello, 510 F.2d 476, 477 (5th Cir. 1975); United States v. West, 411 F.2d 1083, 1085 (3d Cir. 1975); cf. United States v. Johnson, 495 F.2d 242, 244 (10th Cir. 1974). A new trial is thus required to allow jury consideration of this portion of appellant's entrapment defense after proper instructions. United States

v. Mosely, supra, 496 F.2d at 1016; United States v. West, supra, 511 F.2d at 1085; United States v. Bueno, supra, 447 F.2d at 906.

United States v. Bueno, supra, first articulated the relevant principle that entrapment is established as a matter of law when it is shown that the contraband sold by an accused to a Government agent had initially been furnished by a Government informer. In Bueno, the contraband supplied was heroin. Bueno and its progeny* based their rulings on the ground that these kinds of sales of contraband were impermissibly effectuated only through the creative activity of the Government and that this kind of governmental conduct should not be tolerated. See, e.g., United States v. Bueno, supra, 447 F.2d at 906; United States v. West, supra, 511 F.2d at 1085.**

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*See, e.g., United States v. Mosely, supra, 496 F.2d 1012; United States v. Oquendo, supra, 490 F.2d 161; United States v. Gomez-Rojas, supra, 507 F.2d 1213; United States v. Minichiello, supra, 510 F.2d 576; United States v. West, supra, 511 F .2d 1083.

**In West, the Third Circuit stated:

> ... [I]t puts the law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing.
>
> Id., 511 F.2d at 1083.

The principle enunciated in Bueno is not precluded by the Supreme Court's decision in United States v. Russell, 411 U.S. 423, 435 (1973). Russell does not control here since it is distinguishable on its facts. United States v. Oquendo, supra, 490 F.2d at 164; United States v. Gomez-Rojas, supra, 507 F.2d at 1218 n.3; United States v. Mosely, supra, 496 F.2d at 1015-1016; Entrapment Rationale Employed to Condemn Government Furnishing of Contraband, 59 Minn.L.R. 444, 459 (1974). In Russell, the Government agent supplied phenyl-2-propane, a legal, harmless, obtainable substance, which was used by the accused to manufacture methamphetamines. United States v. Russell, supra, 411 U.S. at 431-433.*

Here, to the contrary, appellant testified that DuBois furnished him with the contraband which was the subject of his criminal charge. United States v. Oquendo, supra, 490 F.2d at 163; see also Entrapment: Sorrells to Russell, 49 Notre Dame Lawyer 579, 582 n.40 (1974).

United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974), and United States v. Hampton, 507 F.2d 832, 835 (8th Cir. 1974) (Heaney, J., dissenting), which rely on Russell to reject the proposition that entrapment is established as a matter of law where contraband is supplied by the Government,

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*The Court itself emphasized that the Government informer had not supplied contraband to the accused. United States v. Russell, supra, 411 U.S. at 431-432.

are incorrectly decided. They fail to recognize that Russell did not deal with the Government's supplying contraband. Further, they fail to perceive that the availability of a defense based on the Government's supplying of contraband is consistent with the traditional entrapment defense* in that the Government is not impeded in prosecutions of the criminal who is predisposed to commit a specific crime. Clearly, an individual who is truly predisposed to sell contraband can ordinarily obtain it himself.**

Moreover, the kind of governmental activity to which appellant testified is so outrageous that, if found to be true, it would bar the Government from prosecution on due process grounds. United States v. Russell, supra, 411 U.S. at 431-432; cf. Rochin v. California, 342 U.S. 165 (1952); United States v. Archer, 486 F.2d 670, 676-677 (2d Cir. 1973).

This Court has apparently not decided whether acquittal is required when it is shown that an informer is the supplier of contraband. The adoption of this rule would provide a check on illegal Government activities and would help assure that only the unwary criminal is convicted (see ap-

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*See Sherman v. United States, 356 U.S. 369, 372 (1958); Sorrells v. United States, 287 U.S. 435 (1932).

**In this sense the requested instruction does not eliminate propensity, but rather insures convictions only of those who are genuinely predisposed to crime.

pellant's brief, supra, at 10).* Moreover, it would encourage beneficial police practices. Necessarily, the police would exercise greater precautions in dealing with informers generally, and would insure that greater control is exercised over their performance. Further, the requirement of acquittal would deprive an informer of his motivation to deal in contraband. In turn, this would have the desired effect of lowering the overall trade in contraband. See Entrapment Rationale Employed to Condemn Government Furnishing of Contraband, supra, 59 Minn.L.R. at 457.

The District Court failed to instruct the jurors that they must acquit appellant if they found that DuBois had supplied appellant with guns. Although defense counsel did not request this instruction, the District Court's failure to instruct affected substantial rights and was plain error. See Rule 52(b), Federal Rules of Criminal Procedure. Reversal of the conviction is required.

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*One rationale for allowing undercover police work generally is that it is necessary for the detection of certain crimes, e.g., sale of contraband. However, furnishing the contraband does not make the detection of the selling of contraband easier.

Point II

THE INDICTMENT CHARGING APPELLANT WITH DEALING IN FIREARMS MUST BE DISMISSED BECAUSE THE SPECIAL ATTORNEY WHO PRESENTED THE CASE TO THE GRAND JURY EXCEEDED HIS AUTHORITY IN OBTAINING THE INDICTMENT OF APPELLANT.

Title 28, U.S.C. §515(a) provides, in pertinent part, that a Special Assistant must be specifically authorized by the Attorney General to conduct valid grand jury proceedings. In accordance with the statute, David J. Ritchie, the Special Attorney who presented this case to the grand jury, was appointed by letter of commission dated September 28, 1972 (see "D" to appellant's separate appendix). This letter of commission specifically appointed Ritchie to assist in cases arising out of violations of the following statutes: extortion in aid of racketeering (18 U.S.C. §1951); embezzlement of union funds (29 U.S.C. §501(c)) and the funds of welfare or pension plans (18 U.S.C. §664)); payments by employers to their employees and to officials of labor organizations (29 U.S.C. §186); the filing of reports and the maintenance of records by unions and union officials (29 U.S.C. §439); deprivation of the rights of a union member by force (29 U.S.C. §530); obstruction of justice (18 U.S.C. §1503); obstruction of criminal investigations (18 U.S.C. §1510); obstruction of state or local law enforcement (18 U.S.C. §1511); travel and transportation in aid of racketeering

(18 U.S.C. §1952); transmission of bets, wagers, and related information by wire communications (18 U.S.C. §1804); interstate transportation of wagering paraphernalia (18 U.S.C. §1953); prohibition of illegal gambling businesses (18 U.S.C. §1955); racketeer-influenced and corrupt organizations (18 U.S.C. §1962); perjury (18 U.S.C. §1621); false declarations (18 U.S.C. §1623); mail fraud (18 U.S.C. §1341); fraud by wire (18 U.S.C. §1343); interstate transportation of stolen property (18 U.S.C. §2314); wire and radio communication (47 U.S.C. §§203, 501); internal revenue (26 U.S.C. §§7201-7206). Thus, the Special Attorney was not authorized to assist in cases involving the sale of firearms without a license (18 U.S.C. §922(a)(1)), and it was beyond his authority to obtain the indictment charging appellant with violating this statute. Therefore, the indictment should be dismissed.*

After listing the specific crimes which Strike Force Attorney Ritchie is authorized to prosecute, his commission contains the words "and other criminal laws of the United States." However, the inclusion of these words does not allow the inference that broad authority was delegated to him. In fact, if broad authority were to be delegated,

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*Accord, United States v. O'Gorman, 73 Cr. 440 (E.D.N.Y. 1975). This decision is presently before this Court, Doc. No. 75-1324. The O'Gorman memorandum and order is "E" to appellant's separate appendix.

the appointing Assistant Attorney General would have appointed this Special Attorney by a broadly worded commission, similar to that upheld by this Court in In re Grand Jury Subpoena v. Persico, Doc. No. 75-2030 (2d Cir., June 18, 1975).*

Moreover, as stated in the similar situation presented in United States v. O'Gorman, supra:

> It hardly seems plausible that a detailed list of ten criminal [here 21] "transactions" would be included in a commission intended to grant authority to proceed against any violation of a criminal law of the United States. At best, the final phrase ["and other criminal laws of the United States"] might support the inclusion of crimes related in some manner to those enumerated.
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> Appendix "E," at 4.

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*In Persico, supra, appellant claimed that a broadly worded commission conflicted with 18 U.S.C. §515(a)'s requirement that a Special Assistant be specifically authorized. That issue is not involved in this case. Here, the Special Assistant was specifically authorized. Rather, appellant claims that he acted outside this authorization. See In re Grand Jury Subpoena v. Persico, supra, at 4712.

CONCLUSION

For the above-stated reasons, the judgment should be reversed and the indictment dismissed; in the alternative, the case should be remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

October 6, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Nathan Silbermann